United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1251

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P/S

United States Court of Appeals

To be argued by
Kevin Ross

FOR THE SECOND CIRCUIT

Docket No. 76-1251

UNITED STATES OF AMERICA,
Appellant,

—*against*—

JOHN MAURO and JOHN FUSCO,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE MAURO

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BRIEF FOR APPELLEE MAURO

Preliminary Statement

This is a consolidated appeal. With regard to defendant-appellee JOHN MAURO, the United States appeals from an order of the United States District Court for the Eastern District of New York (Bartels) dated April 26th, 1976, and entered May 17, 1976, dismissing an indictment against defendant MAURO, pursuant to Article IV (e) of the Interstate Agreement on Detainers (18, U.S.C. Appendix).

In granting the appellee MAURO'S motion to dismiss the indictment (charging criminal contempt in violation of

18 U.S.C. § 401) Judge Bartels held that the Interstate Agreement on Detainers required dismissal of the Federal indictment where the federal government had produced MAURO, a state prisoner, for prosecution, by means of a writ of habeas corpus ad prosequendum, but had returned him to state custody without being tried.

Statement of the Case

On December 12, 1974 JOHN MAURO was sentenced to a term of imprisonment of from three years to life by the State of New York. On May 7, 1975, Mr. Mauro was produced in federal custody in the Eastern District of New York, pursuant to a writ of habeas corpus ad testificandum. He was held in civil contempt for refusing to testify before the Grand Jury by Judge Constantino on May 12th, 1975, and was sentenced to a term of six months or the life of the Grand Jury. Mr. Mauro was returned to New York custody at his place of imprisonment at Auburn, New York on July 30, 1975, a federal detainer charging contempt of court having been lodged against him on July 9, 1975 (A-8)*.

Mr. Mauro was again produced in the Eastern District on November 24, 1975, pursuant to a writ of habeas corpus ad prosequendum issued November 5, 1975 (A-123), having been

*A - Refers to government's appendix on appeal.

indicted for criminal contempt of court in violation of 18 U.S.C. § 401, on November 11, 1975. He was arraigned on December 2, 1975, and trial was set down for March 17, 1976 (A-9). Mr. Mauro, through his attorney, Mr. Murphy, asked that he remain in federal custody in New York, pending trial (A-74,75). His intent to remain in New York was motivated by a desire to visit his dying grandmother and to take advantage of the federal detention facility's more liberal visitation privileges, in order to see his wife and child, who reside in New York (A-90,91).

Notwithstanding his request to remain in federal custody in New York City pending trial, he was returned to state custody at the Auburn Correctional facility on December 11, 1975, without having been tried. He was again produced on April 23, 1976, pursuant to a writ of habeas corpus ad prosequendum issued April 14, 1976 (A-9).

Mr. Mauro, feeling that his continual shuttling between Auburn and New York constituted a violation of his rights under the detainer agreement, took his remedy as therein prescribed. On April 26th, 1976 he moved for a dismissal of the indictment pursuant to Article IV (e) of the agreement, before Judge Bartels. The motion was granted and the indictment

immediately dismissed (A-97), and an opinion filed on May 17, 1976. The gravamen of the decision was that the express language of the agreement on detainers required dismissal of the indictment (A-7).

ARGUMENT

The Interstate Agreement on Detainers is Applicable To Production of a State Prisoner by the Federal Government Through Use of a Writ of Habeas Corpus Ad Prosequendum (28 U.S.C. § 2241 (c)(5)).

A. Introduction

The Government on this appeal argues that the Interstate Agreement on Detainers (18 U.S.C. App. 1971) does not apply to writs of habeas corpus ad prosequendum, reasoning that if the agreement does control the writ, then it would constitute an implied repeal of 28 U.S.C. § 2241 (c)(5), the section authorizing the use of the writ (Appellant's Brief,p.5).

The Government's position is untenable and ignores the traditional use and nature of the writ, which was always beset with serious problems of enforcement. The interstate agreement on detainers, far from repealing the writ of habeas corpus ad prosequendum, builds around the writ a uniform

statutory scheme rendering it enforceable. Therefore, as is contrary to the Government's position, the Interstate Agreement on Detainers means what it says.

B. The Writ of Habeas Corpus Ad Prosequendum

Despite the mandatory language of a writ of habeas corpus ad prosequendum, it is well recognized, and has long been held, that a federal court cannot compel a state, by the issuance of such a writ, to produce a state prisoner in Federal Court.[1] This proposition arises from the principle that a sovereign state, or its courts, cannot be deprived of the custody of a person until its jurisdiction and remedy is exhausted, and no other sovereign can interfere with that custody. Ponzi v. Fessenden 258 U.S. 254, 42 S.Ct. 309, 66 L.Ed 607 (1922. In other words, the production of a state prisoner in a federal court, or vice versa, by writ of habeas corpus ad prosequendum is a matter of comity between

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[1] Derenbowski v. U.S. Marshall, Minneaplis Office, Minn. Div, 377 F2d 223 (8th circ. 1967). Lundsford v. Hudspeth, 126 F2d 653 (10th circ. 1942). Stamphill v. Johnston, 136 F2d 291 (9th circ. 1943). United States v. Ayscue, 187 F. Supp. 946 (E.D.NC. 1960), affirmed, 303 F2d 784 (4th circ. 1961). United States ex rel Moses v. Kipp, 232 F2d 147 (7th circ. 1956). See also, Anno., "Writ of Habeas Corpus Ad Prosequendum in Federal Courts", 5 L.Ed2964.

sovereigns. Carbo v. United States, 364 U.S. 611, 81 S.Ct. 338, 5 L Ed2 329 (1961).[2]

It can readily be seen, therefore, that the Interstate Agreement on Detainers does not abolish the writ, but instead is a statutory scheme implementing it.[3]

Moreover, to hold otherwise would be to ignore the very nature of the agreement, as evidenced by its name. It is an Agreement between sovereigns, just as a state's cooperation with a federal writ of habeas corpus ad prosequendum is an agreement. The Interstate Agreement on Detainers is simply a codification bestowing uniformity on the way that sovereigns agree to produce prisoners for trial, and the sovereigns themselves are beneficiaries of the agreement.

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[2]Ponzi v. Fessenden , 258 U.S. 254, supra, and its progeny (n.1. supra) are not weakened by the Carbo case, in which the Court reaffirmed the comity principle's relationship to the writ, and expressly refused to discuss the issue here involved: "In view of the cooperation extended by the New York authorities, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation". Carbo v. United States, 364 U.S. at 621, n. 20.

[3]Since it has always been the case that a state had the right to refuse a request by the Federal Government for custody of a state prisoner for purposes of a trial, whether or not it is couched in the form of a writ of habeas corpus ad prosequendum, Article IV(a) of the Agreement which provides that the "***sending state may disapprove the request for temporary custody or availability" adds nothing new. Consequently, that provision supports the argument for application of the agreement to the writ, and not against it. (Appellant's Brief, P.14) see also, The Senate Report, 1970, U.S. Code Cong. & Admin. Laws 4864 at 4865: "***a Governor's right torefuse to make a prisoner available is preserved***" (Emphasis supplied)

Article I of the Act provides in pertinent part:

> "The party States also find that proceeding with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures."

C. The Agreement

The appellant further argues that the intent of Congress in enacting the Agreement on Detainers was to limit the role of the Federal Government to that of a "sending state" (Appellant's Brief, p. 10). This argument is grounded on essentially two points: First, that the Government had no use for the agreement as a "sending state" , since it traditionally had the use of the writ of habeas corpus ad prosequendum to produce state prisoners (Appellant's Brief, p. 9). This argument is discussed supra. Secondly, the appellant argues that the legislative history of the act supports its position.

This "Legislative History" argument can be reduced to two components, the first being the contention that the Senate Report, 1970 U.S. Code Cong. & Admin. Laws, 4864, "Uniformly cast the United States in the role of a sending state . See Senate Report, supra, at 4864-4869." (Appellant's Brief, P. 10). This argument is incorrect.

Examination of the Senate report reveals no less than

five places where either the Federal Government or the District of Columbia is characterized as a "receiving state", or where such characterization is implied.[4] The second component of the appellant's "Legislative History" argument is a "Future History" argument. The appellant argues that since an amendment[5] has been proposed limiting the participation of the Federal Government in the Detainer Agreement to that of a "sending state", this fact is sufficient disclosure of a similar intent by the ninety-first congress when it enacted the Agreement. (Appellant's Brief, p. 11). As, however, it was

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[4] "In the absence of the Agreement on Detainers, prisoners do not have any way of initiating legal proceedings to clear detainers filed against them by authorities outside the state or other jurisdiction in which they are imprisoned." Senate Report, 1970 U.S. Code Cong. & Admin. Laws, 4864, at 4865. (Emphasis added).

"However, a Governor's right to refuse to make a prisoner available is preserved***" IBID (Emphasis Added).

"Unless the request is disapproved by the Governor of the State having custody***" ID (Emphasis added).

"In the case of a Federal prisoner, the prosecution would be entitled to temporary custody" ID (Emphasis added). Quaere: If the Agreement was directed at only the production of Federal prisoners, why would an express description of "the case of a Federal prisoner" be necessary, when referring to prisoners in general?

"Furthermore, unless the legislation is made applicable to the District, its prosecuting authorities would not be able to have a prisoner in a party state made available for disposition of local detainers". Senate Report, supra, at 4867.

And Finally, "H.R. 6951, if passed will also entitle the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party state made available for disposition of such detainer". Senate Report at 4869.(Emphasis Added).

[5] § 3201(a) of the Criminal Justice Reform Act, known as "S-1".

stated in the decision of Judge Bartels in the Court below:

> "Both the provisions of S-1 and the committee comments thereon are today irrelevant for the following reasons: 1) S-1 has not yet been enacted by congress and may never be, 2) there is no assurance that the Congress as a whole will accept § 3201 (a) as part of S-1 when and if it finally is enacted, and 3) no subsequent Congress is in a position to express the intent of a previous Congress in enacting legislation" (A-18).

In sum, the Appellant's contentions with regard to evidence of congressional intent limiting the Federal Government's role to that of a"sending state" are erroneous.

More importantly, the express language of the agreement rebuts the appellant's position with regard to any limitation of the Federal Government's role.

Article II of the Agreement clearly defines the United States Government as a "state" within the meaning of the agreement, and generally describes states as "sending" or "receiving' states.

Article I clearly designates as beneficiary of the Agreement that prisoner who has been charged with a crime against a sovereign other than the sovereign holding him in custody. The express purpose of the act is to lessen the harmful effects of detainers upon rehabilitation of such a prisoner, and to encourage speedy trials of the charges serving

as the basis of a detainer.

Article IV(e) in pertinent part provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment***, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice".

The above provision makes available to the prisoners, as beneficiary of the agreement, one of the few sanctions created by the agreement. This provision is an agreement by each sovereign party, including the Federal Government, that, in order to lessen the harmful effects of detainers and insure speedy trials, it will always try a produced prisoner before returning the prisoner to the "sending" jurisdiction.

To interpret this agreement (where it requires no interpretation) to exclude production of state prisoners by Federal writ of habeas corpus ad prosequendum would be to render this law a law with "wax teeth" and an exercise in legislative futility. United States ex rel Esola v. Groomes, 520 F2d 830 at 837 (3rd circ. 1975). The agreement means what it says. United States v. Cappucci 342 F. Supp 790 (E.D. Pa. 1972).

Finally, the Appellant cannot argue that the facts of the present case remove it from operation of the agreement. Mr. Mauro was produced in Federal custody as provided by the agreement.

A detainer was lodged against him (A-8) and a request for temporary custody was made via the writ of habeas corpus ad prosequendum (A-123). He was produced thereupon, just as is provided by Articles Four and Five of the Agreement. Furthermore, it cannot be said that Mr. Mauro waived his rights under the Agreement. Through his attorney, Mr. Murphy, he stated that he wished to remain in Federal custody in New York City pending trial (A-74, 75). That this intent was unequivocal is shown by the statement of Mr. Murphy, in conjunction with that of Mr. Rosenkranz, attorney for Robert Smith, a defendant in a similar situation under Ind. No. 75 Cr. 81):

> "Mr. Rosenkranz: Mr. Smith prefers to remain in the M.C.C.
>
> "Mr. Murphy: As does Mr. Mauro (A-75)."

Thus the record shows that Mr. Mauro did absolutely nothing to prompt his return to state custody, and that he expressed a desire to remain in Federal custody. In no sense of the word can he be considered to have waived his rights.[6]

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[6] Consequently, the decision of People v. Bernstein, 344 NYS2d 786 (Dutchess Co. Ct. 1973), relied upon by the Appellant is distinguishable and furthermore, ill reasoned. The Court there held that the Interstate Agreement does not apply where a defendant makes pre-trial motions, and the defendant for some unknown reason is sent back to the sending jurisdiction without trial. The Court does not discuss what one has to do with the other, if anything, discusses no authority, and does not offer a rationale for the decision.

In summary, the language of the Interstate Agreement is explicit and its intent clear, and the Agreement is applicable to the production of state prisoners by Federal wtit of habeas corpus.

Conclusion

The Order of the District Court Dismissing the Indictment Should be Affirmed.

Dated: August 19, 1976

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